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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

COLEY QUINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *United States* v. *Booker*, 543 U.S. 220 (2005), the United States Sentencing Guidelines are advisory rather than mandatory in resentencings conducted under 18 U.S.C. § 3582(c)(2), as they are in initial sentencing proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Coley Quinn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-5a) is unpublished. The district court's resentencing order (App., *infra*, 6a-7a) and order denying reconsideration (App., *infra*, 8a) are also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

2. Title 18, U.S. Code § 3582(c)(2) provides in pertinent part:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment,

> after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

3. United States Sentencing Guidelines ("U.S.S.G.") § 1B1.10(b)(1) provides in pertinent part:

> In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced.

4. U.S.S.G. § 1B1.10(b)(2)(A) provides in pertinent part:

> *In General.*—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

STATEMENT

Notwithstanding this Court's contrary guidance in *United States* v. *Booker*, 543 U.S. 220 (2005), *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007), and subsequent decisions, numerous courts of appeals have continued to treat the United States Sentencing Guidelines as mandatory in many circumstances. This case involves one very important such circumstance, on which the circuits have divided: It pre-

sents the question whether the Guidelines bind judges who conduct *resentencing* proceedings under 18 U.S.C. § 3582(c)(2), which arise when the U.S. Sentencing Commission promulgates Guidelines amendments that have retroactive force. The Ninth Circuit appreciated, in *United States* v. *Hicks*, 472 F.3d 1167 (9th Cir. 2007), that such resentencings must be guided by the Guidelines through this Court's *Booker* analysis, which establishes that the Guidelines are advisory and do not bind sentencing courts. In this case, however, the Eleventh Circuit disregarded that line of authority, treating the Commission's pronouncements as absolutely binding on a resentencing court. Thus, in the Eleventh Circuit, the Sentencing Commission is still able to make binding directions to sentencing courts in a significant category of proceedings, in plain conflict with *Booker*'s explanation of a defendant's right under Sixth Amendment. This error—which has been committed in the majority of the circuits—calls out for correction by this Court. Indeed, in the years since the decision in *Booker*, the Court repeatedly has found it necessary to correct similar errors by courts of appeals that have been reluctant to apply the *Booker* principle.

This case provides an excellent vehicle for addressing the resentencing issue. Petitioner Coley Quinn is one of thousands of federal prisoners who became eligible for a § 3582(c)(2) resentencing following the promulgation of Guidelines Amendments 706 and 713, which reduced the Guidelines' base offense levels for crack cocaine-related crimes. His sentence rests on a judge's sentencing-stage factual finding, not a finding by the jury that convicted him. Despite *Booker*'s having rendered the Guidelines advisory, the court hearing petitioner's resentencing motion

treated the amended Guidelines range as mandatory in calculating a § 3582(c)(2) sentence. This approach misreads *Booker*, misapplies the Sixth Amendment's jury trial guarantee, and deprives petitioner of an appropriate recalculation of his sentence by a sentencing court.

A. Legal Background

The Sentencing Commission is obligated by statute "periodically" to "review and revise * * * the guidelines promulgated." 28 U.S.C. § 994(o). Revisions promulgated by the Commission pursuant to this process are sometimes made retroactive, *i.e.*, applicable to sentences already being served; in those circumstances, 18 U.S.C. § 3582(c)(2) affords district court judges the discretion to resentence a defendant "to a term of imprisonment based on a sentencing range that has subsequently been lowered." These proceedings are known as "resentencing" hearings. See, *e.g.*, *United States* v. *Vandewege*, 561 F.3d 608, 609 (6th Cir. 2009); *United States* v. *Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007); *United States* v. *Menafee*, No. 3:04-CR-138, 2009 WL 1708104, at *2 (D. Conn. June 16, 2009).

On May 1, 2007, pursuant to 28 U.S.C. §§ 994(a) and 994(p), the Sentencing Commission promulgated Guidelines Amendment 706, which, for crack cocaine-related crimes, adjusted the base offense levels of the Guidelines downward by two steps. Motivated by the "urgent and compelling" problems associated with the existing 100-to-1 crack-to-powder cocaine Guidelines ratio, the Commission found that the Guidelines themselves "contribute[d] to the problems associated with" the ratio. U.S.S.G. App'x C, Amend. 706.

On December 10, 2007, this Court's decision in *Kimbrough* v. *United States* further clarified its remedial holding in *Booker*. 128 S. Ct. 558 (2007). *Kimbrough* emphasized that while a court must "give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'" *Id.* at 570 (quoting *Booker*, 543 U.S. at 245-246). *Kimbrough* made clear, if *Booker* left any doubt, that the cocaine-quantity Sentencing Guidelines are "effectively advisory" only and serve as "one factor among several [that] courts must consider in determining an appropriate sentence." *Id.* at 564 (quoting *Booker*, 543 at 245). Thus, a sentencing judge may consider—and disagree with—the Guidelines' disparate treatment of crack and powder cocaine. *Ibid.*

The day after *Kimbrough* was handed down, the Sentencing Commission approved two further Guidelines amendments pertinent here. One was Amendment 713, which amended § 1B1.10 of the Guidelines to include Amendment 706 in the list of amendments that apply retroactively. U.S.S.G. App'x C, Amend. 713. Effective March 3, 2008, Amendment 713 made thousands of federal prisoners eligible for resentencing under § 3582(c)(2) so as to obtain the reduced sentence for crack-related offenses effected by Amendment 706.

The other was Amendment 712, which altered the Guidelines' "policy statements" applicable to all retroactive guidelines, including Amendment 706. U.S.S.G. App'x C, Amend. 712; App., *infra*, 9a-16a. The amended policy statements purport to prohibit district court judges from imposing a § 3582(c)(2) sentence that is "less than the minimum term of imprisonment provided by the amended guideline

range." U.S.S.G. § 1B1.10(b)(2). Through Amendment 712, the Sentencing Commission attempted, notwithstanding *Booker* and the just-decided *Kimbrough*, to require judges to treat the Guidelines as providing a nonstatutory, mandatory minimum sentence in all § 3582(c)(2) resentencings.

B. Factual Background

On April 14, 1993, petitioner was arrested with two other individuals and charged with three counts: (1) conspiracy with intent to distribute cocaine base, or "crack," (2) possession of cocaine hydrochloride, or "powder" cocaine, and (3) possession of a firearm. See *United States* v. *Quinn*, 123 F.3d 1415, 1417-1418 (11th Cir. 1997).

On July 1, 1994, petitioner was convicted by a jury on all counts and sentenced to the low end of the Guidelines range then applicable to his drug offense—235 months—plus a 60-month mandatory consecutive term for the firearms charge. *Ibid.* At sentencing, the parties disputed whether petitioner should be sentenced for the powder cocaine or the crack cocaine, with petitioner arguing that there was insufficient evidence to sentence him under the higher crack cocaine penalties because the "jury's verdict did not specify the object of Quinn's conspiracy, *i.e.*, possession with intent to distribute cocaine hydrochloride or crack cocaine." *Ibid.* On direct appeal, the Eleventh Circuit rejected that objection, holding that the district judge's finding was sufficient to permit sentencing under the crack cocaine guidelines notwithstanding the lack of a jury finding. *Ibid.* Had petitioner been sentenced under the powder cocaine Sentencing Guidelines then in force, his sentencing range on the cocaine charges would have

been between 78 and 97 months, substantially below the 235-month crack cocaine sentence he was given.

Upon the Sentencing Commission's promulgation of Amendments 706 and 713, fourteen years after his initial conviction, petitioner moved for resentencing pursuant to § 3582(c)(2). The district court reduced petitioner's base offense level by two points, the level of the reduction provided by Amendment 706. This reduced the sentencing range on the cocaine charges from 235-293 months to 188-235 months, and the sentencing court again placed petitioner at the bottom end of the range, imposing a 188-month sentence on the cocaine charges (while retaining the 60-month firearm sentence). App., *infra*, 6a. The district court, however, denied petitioner's motion to reconsider reducing his sentence further based on a full weighing of all the factors that, post *Booker*, bear on initial sentencing under 18 U.S.C. § 3553(a). App., *infra*, 8a. Petitioner's new, 188-month crack cocaine sentence is roughly twice the maximum sentence he could have been given under the powder cocaine guidelines.

Petitioner appealed, arguing that the Sixth Amendment, as applied in *Booker*, required the § 3582(c)(2) resentencing court to address each of the sentencing factors in 18 U.S.C. § 3553(a), without treating Guidelines §§ 1B1.10 and 2D1.1 as mandatory. The Eleventh Circuit disagreed, holding that, while a district court "has discretion to reduce the sentence of a defendant whose sentencing range has been lowered by Amendment 706," any such reduction "must be 'consistent with applicable policy statements issued by the Sentencing Commission'" App., *infra*, 3a (quoting § 3582(c)(2)). The court found that despite this Court's remedial opinion in *Booker*

and *Kimbrough*, a judge's discretion in reducing a defendant's sentence in a § 3882(c)(2) resentencing is limited by the Sentencing Guidelines, including the Commission's own policy statement as to the binding force of the Guidelines issued the day after *Kimbrough*. App., *infra*, 3a-4a.

The Eleventh Circuit held, therefore, that during resentencing hearings "a court may not reconsider any of its original sentencing determinations other than the provision subject to the amendment." App., *infra*, 3a. Relying on its recent decision in *United States* v. *Melvin*, 556 F.3d 1190 (11th Cir. 2009), the court of appeals accordingly "rejected Quinn's argument that the district court has the authority to apply *Booker* in a § 3582 resentencing." App., *infra*, 3a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND DEVELOPED CONFLICT AMONG THE CIRCUITS ON THE APPLICABILITY OF *BOOKER* TO § 3582(c)(2) RESENTENCING PROCEEDINGS.

The Eleventh Circuit, along with the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, is in direct conflict with the Ninth Circuit's holding in *Hicks* that the principles of *Booker* govern resentencing. Compare *United States* v. *Doublin*, No. 08-30775, 2009 WL 1743661 (5th Cir. June 22, 2009) (holding that a district court may not reduce a defendant's sentence below the amended Guidelines range in a § 3582(c)(2) resentencing); *United States* v. *Savoy*, No. 08-4900-cr, 2009 WL 1457976 (2d Cir. 27 May 2009) (same); *United States* v. *Doe*, 564 F.3d 305 (3d Cir. 2009) (same); *United States.* v. *Fanfan*, 558 F.3d 105 (1st Cir. 2009), petition for cert. pending, No. 08-10503 (same); *United*

States v. *Melvin*, 556 F.3d 1190 (11th Cir. 2009), cert denied, No. 08-8664, 2009 WL 357585 (May 18, 2009) (same); *United States* v. *Cunningham*, 554 F.3d 703 (7th Cir. 2009), cert. denied, No. 08-1149, 2009 WL 688846 (June 22, 2009) (same); *United States* v. *Starks*, 551 F.3d 839 (8th Cir. 2009), cert. denied, No. 08-9839, 2009 WL 1043901 (June 1, 2009) (same); *United States* v. *Dunphy*, 551 F.3d 247 (4th Cir. 2009), cert. denied, No. 08-1185, 2009 WL 772917 (May 18, 2009) (same); *United States* v. *Rhodes*, 549 F.3d 833 (10th Cir. 2008), cert. denied, No. 08-8318, 129 S. Ct. 2052 (2009) (same); with *Hicks*, 472 F.3d 1167 (holding a district court may reduce a defendant's sentence below the amended Guidelines range in a § 3582(c)(2) resentencing). The lopsided nature of this split, however, masks considerably broader disagreement and confusion on the issue in the lower courts, and the Ninth Circuit's position is plainly correct. The Court should grant the petition to set aside the rule applied by those circuits, like the court of appeals here, that have failed to heed the plain rule of *Booker*.

1. In *Hicks*, the Ninth Circuit recognized that "the clear language of *Booker*" requires that the amended Guidelines range be treated as advisory in § 3582(c)(2) resentencing proceedings, just as *Booker* limits the Guidelines to advisory effect in original sentencing proceedings. *Hicks*, 472 F.3d at 1170. *Booker* "explicitly stated that, 'as by now should be clear, [a] mandatory [Guidelines] system is not longer an open choice,'" and "rejected the argument that the Guidelines might remain mandatory in some cases but not others." *Hicks*, 472 F.3d at 1170; see *Booker*, 543 U.S. at 265-266 ("[W]e repeat, given today's constitutional holding, [a mandatory guideline regime] is not a choice that remains open. * * *

[W]e do not see how it is possible to leave the Guidelines as binding in other cases."). Because *Booker* made it "clear the Guidelines are no longer mandatory in *any* context," *Hicks*, 472 F.3d at 1172, the Ninth Circuit rejected as "false" the dichotomy whereby original resentencing proceedings are performed using an advisory system while § 3582(c)(2) proceedings are performed using mandatory sentencing guidelines. *Id.* at 1171. It concluded that "[t]o the extent that the [Sentencing Commission's] policy statements would have the effect of making the Guidelines mandatory (even in the restricted context of § 3582(c)(2)) they must be void." *Id.* at 1172.

2. Whether the guidelines are mandatory in § 3582(c)(2) resentencing proceedings under *Booker* remains a divisive question even within those courts of appeals that have, in conflict with *Hicks*, held that the guidelines are mandatory in such proceedings. In the Tenth Circuit, Judge McKay has disagreed with the circuit authority of *Rhodes*, urging that, following *Booker*, a resentencing court must be able to reduce a defendant's sentence "to the sentence it would have given if it did not feel constrained to treat the bottom of the amended guidelines range as a mandatory floor." *United States* v. *Pedraza*, 550 F.3d 1218, 1223 (10th Cir. 2008) (McKay, J., dissenting).

Similarly, Judge Bye of the Eighth Circuit has recently argued that *Starks* was wrongly decided by that court. *United States* v. *Harris*, 556 F.3d 887, 889 (8th Cir. 2009) (Bye, J., concurring). Echoing the Ninth Circuit's reasoning in *Hicks*, Judge Bye reasoned that, "[b]ecause *Booker* made clear the guidelines are no longer mandatory in any context, the guidelines should not be mandatory when resentencing a defendant." *Ibid.* He concluded that §1B1.10

"is, like all of the guidelines, advisory under *Booker*." *Ibid.*

Recent decisions in district courts in the Fifth and D.C. Circuits embracing *Hicks* have contributed to the continued vitality of the split. See, *e.g.*, *United States* v. *Blakely*, No. 3:02-CR-209-K, 2009 WL 174265, at *6 (N.D. Tex. Jan. 23, 2009); *United States* v. *Reid*, 584 F. Supp. 2d 187, 190 (D.D.C. 2008); *United States* v. *Ragland*, 568 F. Supp. 2d 19, 24 (D.D.C. 2008). Other district courts, unsure of the state of the law, have gone so far as to "urge" defense counsel to take the issue to this Court. *United States* v. *Perez*, No. 4:05-CR-3010, 2008 WL 2309497 *1 n. 3 (D. Neb. June 4, 2008).

Given the extent of continuing disagreement about the applicability of *Booker* to § 3582(c)(2) resentencing proceedings among the courts of appeals and the confusion among the district courts, there is no reason to expect the lower courts to reach consensus on this issue, and every reason to anticipate that this Court will receive numerous petitions presenting the same, or a similar, question in the future.

3. The Court has recently denied five petitions raising substantially the same issue presented here, though each presented the issue in the context of a plea agreement rather than an initial sentencing after trial. *Rhodes* v. *United States*, No. 08-8318, cert. denied, 129 S. Ct. 2052 (April 27, 2009); *Dunphy* v. *United States*, No. 08-1185, cert. denied, 2009 WL 772917 (May 18, 2009); *Melvin* v. *United States*, No. 08-8664, cert. denied, 2009 WL 357585 (May 18, 2009); *Starks* v. *United States*, No. 08-9839, cert. denied, 2009 WL 1043901 (June 1, 2009); *Cunningham* v. *United States*, No. 08-1149, cert. denied, 2009 WL

688845 (June 22, 2009). The Court should nonetheless grant this petition.[1]

In its opposition to certiorari in *Rhodes*, the government's principal argument was that the Ninth Circuit could eliminate the clear split among the circuits by reversing its position in *Hicks*, which the government was encouraging it to do by seeking an initial hearing en banc in *United States* v. *Fox*, No. 08-30445 (9th Cir.), a case before that court that arguably presents the same issue. *Rhodes*, No. 08-8318, U.S. Br. (March 27, 2009), at 7, 16. The government's two- and three-page briefs opposing certiorari in *Dunphy* and *Cunningham*, respectively, incorporated the *Rhodes* brief's argument and reiterated the government's hope that the Ninth Circuit might take *Fox* en banc to overturn the *Hicks* rule. See *Dunphy*, No. 08-1185, U.S. Br. (Apr. 19, 2009), at 2; *Cunningham*, No. 08-1149, U.S. Br. (May 18, 2009), at 2.

There is no reason to believe, however, that a reversal by the Ninth Circuit will be forthcoming. To the contrary, since the *Fox* motion has been pending, a second panel of the Ninth Circuit reaffirmed *Hicks*'s core holding in a published opinion. *United States* v. *Leniear*, No. 08-30199, 2009 WL 1694322, at *4 (9th Cir. June 18, 2009).

Moreover, in *Fox* itself the sentencing court recalculated a sentence following a full, *Booker*-cognizant proceeding under § 3582(c)(2) pursuant to *Hicks*, arriving at a sentence shorter than the time the defendant had already served. The resentencing court accordingly ordered Fox released, over the government's objection. See Order, *United States* v. *Fox*,

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[1] At least one other petition on the issue remains pending: *Fanfan* v. *United States*, No. 08-10503.

No. 3:96-cr-80 JKS (D. Alaska Nov. 20, 2008). The government attempted to stay the ruling or have Fox otherwise detained pending appeal, but a Ninth Circuit panel denied that motion, allowing Fox to remain free from incarceration pending the lengthy appeal process. See Order, *United States* v. *Fox*, No. 08-30445 (9th Cir. Jan. 6, 2009). The government then moved the Ninth Circuit to hear *Fox* en banc in the first instance so that the court could overrule *Hicks*, but the Ninth Circuit has yet to rule on that motion (at the time of filing of this petition) in the six weeks that merits briefing has been complete in *Fox*.

While not a ruling on the merits of the government's procedural request, this course of events provides no indication that the Ninth Circuit is inclined to overrule *Hicks* en banc. If *Hicks* were soon to be rendered bad law, it seems implausible that the court would have refrained from staying Fox's release from custody. Moreover, the government's argument on this point would, carried to its logical conclusion, substantially evade this Court's Rule 10. The federal government's unique status as a repeat litigator in all of the courts of appeals will often provide it an opportunity to litigate an issue time and again in the hope that a court of appeals will reverse a holding that has precipitated a circuit conflict. That is especially unfair in the criminal context, where sentences may become final and unmodifiable even when—as with *Booker*—this Court later clarifies that a sentencing regime was unconstitutional. And an element of this Court's role, as Rule 10(a) recognizes, is to secure uniformity *without* obliging litigants and the lower courts to repeatedly revisit an issue.

Accordingly, the Court should intervene at this point to clarify for each of the circuits the proper application of Sixth Amendment sentencing principles at the time of a § 3582(c)(2) resentencing.

II. TREATING THE SENTENCING GUIDELINES AS MANDATORY IN ANY CONTEXT CONFLICTS WITH THIS COURT'S SIXTH AMENDMENT JURISPRUDENCE.

The confusion in the lower courts itself warrants a grant of review, but certiorari would be warranted on the issue presented here even in the absence of a conflict in the circuits: The holding below, on an issue of tremendous practical importance, is indefensible. Absent intervention by this Court, defendants in the Eleventh and eight other Circuits will be denied application of this Court's remedial holding in *Booker*, as those courts impose sentences in a manner inconsistent with the Sixth Amendment's jury trial guarantee.

A. The Eleventh Circuit's Holding Violates The Sixth Amendment And The Rule Stated By This Court's Remedial Opinion In *Booker*.

In *Booker*, this Court held that the Federal Sentencing Guidelines are "effectively advisory," *Booker*, 543 U.S. at 245, and that their mandatory application violates the Sixth Amendment's jury trial requirements. Petitioner was sentenced after a jury verdict that *did not determine* whether the object of the conspiracy of which he was convicted involved crack or powder cocaine. *United States* v. *Quinn*, 123 F.3d 1415, 1424 (11th Cir. 1997). His sentence rested on a judicial determination of that fact, *ibid.*, the sort of determination that, following *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Booker*, clearly vio-

lates the Sixth Amendment. Yet the court of appeals here approved another sentencing proceeding, conducted subsequent to *Booker*, that involved precisely the same constitutional defect because it rested on the same judicial finding of a fact not found by a jury. That sentencing violated petitioner's Sixth Amendment right to a jury trial.

Nothing in the *Booker* opinion supports the Eleventh Circuit's reasoning that this Court's Sixth Amendment remedial holding does "not apply to § 3582(c)(2) proceedings." App., *infra*, 5a (quoting *United States* v. *Melvin*, 556 F.3d 1190, 1190 (2009)). It is no answer to say, as the Eleventh Circuit did in *Melvin*, that *Booker*'s lack of a specific mention of § 3582(c)(2) means that the principle announced in *Booker* has no application to the statute. *Melvin*, 556 F.3d at 1193. *Booker* makes clear that the Court did "not see how it is *possible* to leave the Guidelines as binding in other cases" while rendering them advisory in some. *Booker*, 543 U.S. at 266 (emphasis added). The Court thus specifically considered, *and rejected*, remedial proposals that would have made the Guidelines mandatory in some circumstances but not others, determining that "a two-system proposal seems unlikely to further Congress' basic objective of promoting uniformity in sentencing." *Id.* at 267. In determining a remedy for the identified Sixth Amendment violation, the Court made the Guidelines advisory in *all* cases.

In stating that a "mandatory system is no longer an open choice," *id.* at 263, *Booker* made clear that the Sixth Amendment "is implicated *whenever* a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant." *Booker*, 543 U.S. at 232 (em-

phasis added). The Eleventh Circuit sought to avoid that rule by drawing an insupportably sharp distinction between original sentencing hearings conducted under 18 U.S.C. § 3553 and resentencing hearings conducted under 18 U.S.C. § 3582(c)(2), positing that the latter do not implicate the Sixth Amendment concerns at issue in *Booker*. But a § 3582(c)(2) sentence is a criminal sentence, and must, constitutionally, be predicated upon facts admitted by a defendant or found by a jury. Nothing in *Booker* stands for the counterintuitive proposition that an unconstitutional sentence may nonetheless be constitutionally re-imposed, with minor modifications, at the direction of the Sentencing Commission.

The Sentencing Commission's attempt to bootstrap a mandatory element back into the system by way of Amendment 712 is similarly unavailing. The defect identified in *Booker* was not the Guidelines' failure clearly to indicate their mandatory status. On the contrary, both the Sentencing Reform Act and the Guidelines themselves presumed mandatory application, the very constitutional problem *Booker* rectified. Hence *Booker*'s silence in 2005 on the advisory status of the Guidelines in § 3582(c)(2) proceedings cannot be read as an endorsement of the view that the Guidelines remain mandatory in that context. It was not until the Commission's 2007 issuance of Amendment 712 that it expressly sought to apply the Guidelines with mandatory force in § 3582(c)(2) proceedings.

Booker held it unconstitutional to read the Guidelines to constrain the district court's sentencing discretion. The present case involves just that problem. Whether in a *sentencing* hearing or a *resentencing* hearing, the same constitutional violation re-

sults from the Guidelines' use to constrain a trial judge's discretion.

B. Since *Booker*, This Court Has Reaffirmed That The Sentencing Guidelines Are Advisory.

This Court has repeatedly reaffirmed *Booker's* remedial holding. In *Kimbrough*, the Court held that while judges must continue "to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'" *Kimbrough*, 128 S. Ct. at 570. Speaking directly to the cocaine Guidelines applied in this case, *Kimbrough* found that "cocaine Guidelines, *like all other Guidelines*, are advisory only." *Id.* at 564 (emphasis added).

Similarly, this Term's holding in *Spears* v. *United States*, 129 S. Ct. 840 (2009), "demonstrate[d] the need to clarify at once the holding of *Kimbrough*." *Id.* at 845. *Spears* responded to the reluctance of some federal courts to implement *Kimbrough*'s ruling that a judge's sentencing could take into account the propriety *vel non* of the 100-to-1 cocaine sentencing ratio. This Court explained that "[i]t is absurd to think that a sentence * * * becomes unreasonable if the sentencing judge chooses to specify his disagreement, and the degree of his disagreement, with the 100:1 ratio, which is the entire basis for his Guidelines departure." *Id.* at 844-845. The Court noted that the dissent in *United States* v. *Spears*, 533 F. 3d 715 (8th Cir. 2008), was the "correct interpretation" of *Booker*. *Spears*, 129 S. Ct. at 841. That dissent reasoned that "even when a particular defendant in a crack cocaine case presents no special mitigating circumstances * * * a sentencing court may nonetheless vary downward from the advisory guideline range."

Id. at 842 (quoting *Spears*, 533 F. 3d at 719) (Colloton, J., dissenting)).

The § 3582(c)(2) issue presented here, which also involves the question whether the Sentencing Guidelines remain mandatory in certain circumstances, involves essentially the same inquiry: Whether a district judge, applying a revised Guidelines range, is empowered to use his or her judgment in applying all of the statutory sentencing considerations, or whether the judge must mechanically apply the Sentencing Commission's approach. *Booker*, *Kimbrough*, and *Spears* all foreclose the latter position.

III. THIS CASE PRESENTS A FREQUENTLY RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE.

The question presented in this petition recurs frequently throughout the federal courts, and will continue to do so until resolved by this Court.

A. The Application of *Booker* To Resentencings Is Frequently Litigated And Transcends The Crack Sentencing Amendment.

According to the Sentencing Commission, as of May 6 of this year the retroactive application of Amendment 706 has resulted in 20,263 motions for resentencing under § 3582(c)(2), 13,813 of which have been granted in the short time since Amendment 706's promulgation. United States Sentencing Commission, *Crack Cocaine Retroactivity Data Report*, tbl. 2 (May 2009), available at http://www.ussc.gov/USSC_Crack_Retroactivity_Report_May2009_1.pdf ("Retroactivity Report"). This figure will continue to rise as "in many districts, contested motions have not [yet] been decided by the court." *Id.*

at 3. In light of the uncertainty surrounding *Booker's* applicability to resentencing hearings, it is foreseeable that a great and growing number of § 3582(c)(2) decisions will be appealed.

But the question of *Booker's* applicability to § 3582(c)(2) hearings is not limited to the thousands of defendants affected by the adoption of Amendments 706 and 713. Since *Booker*, the question has also arisen under Amendment 599. See, *e.g.*, *United States* v. *Hernandez*, 213 Fed. App'x 798 (11th Cir. 2007). The issue will presumably continue to recur as the Commission promulgates other retroactive amendments, something that occurs with considerable frequency: Since its inception, the Sentencing Commission has promulgated twenty-six retroactive amendments. See U.S.S.G. § 1B1.10(c).

B. Equity In Sentencing Demands Consistent Application Of *Booker* Whenever A Court Sentences A Defendant.

There are substantial questions of fairness and equity presented by the circuits' varying approaches to implementing *Booker* in sentencing and resentencing. These questions call for the Court's attention.

Turning the equity issue on its head, the Fourth and Seventh Circuits have suggested that because *Booker* does not apply to defendants whose sentences were final when *Booker* was decided, applying *Booker* to § 3582(c)(2) proceedings would create an inequity among convicted defendants. The argument is that defendants eligible for a retroactive Guidelines amendment could receive a full resentencing (even to correct *Booker* problems unrelated to the subject of the amendment) while other defendants remain unable to invoke *Booker* for pre-*Booker* sentences, an

outcome the courts take to be "unfair." See *Cunningham*, 554 F.3d at 708; *Dunphy*, 551 F.3d at 255.

These courts, however, have failed to heed this Court's explanation of the *Booker* remedy. "*Booker* recognized that some departures from uniformity were a necessary cost of the remedy * * * adopted." *Kimbrough*, 126 S.Ct. at 574; see *Booker*, 543 U.S. at 263 ("We cannot and do not claim that use of a reasonableness standard will provide the uniformity that Congress originally sought to secure."). The "real anomaly would be to sentence someone *today* under a system the Supreme Court declared unconstitutional more than three years ago"—whether at a proceeding denominated a "sentencing" or a "resentencing." *Ragland*, 568 F.Supp.2d at 26-27; see also *United States* v. *Polanco*, No. 02-CR-442-02, 2008 WL 144825, *2 (S.D.N.Y. Jan. 15, 2008) (appreciating that it would be "ironic if the relief available to a defendant who received a sentence now recognized to be unconstitutional * * * can be limited by a still-mandatory guideline.").

To regard those defendants who would be granted a full *Booker* resentencing as unduly lucky "trivializes the considered opinion of the many policymakers and advocates who fought for the crack amendment—including the Sentencing Commission, which declared that applying the Guideline amendment retroactively in crack cocaine cases was a 'partial step' in solving a 'fundamental unfairness in the Federal sentencing policy.'" *United States* v. *Blakely*, No. 3:02-CR-209-K, 2009 WL 174265, at *8 (N.D. Tex. Jan. 23, 2009). For these retroactive amendments to achieve their remedial purpose, defendants should receive the same sentence now that they would have received at their original sentencing had

the fairer, amended, advisory Guidelines been in place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2009

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12921
Non-Argument Calendar

D. C. Docket No. 93-08048-CR-KLR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

COLEY QUINN,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 27, 2009)

Before HULL, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

Coley Quinn, a federal prisoner proceeding *pro se*, appeals the district court's denial of his motion to reconsider his reduced sentence, imposed after the district court granted his motion to reduce sentence under 18 U.S.C. § 3582(c)(2) and Amendment 706. On appeal, Quinn argues that the district court erred in its application of § 3582(c)(2) because it failed to

address the § 3553(a) factors and treated §§ 1B1.10 and 2D1.1 as mandatory, thus violating Quinn's Sixth Amendment rights under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). He argues that his original pre-*Booker* sentence had violated his Sixth Amendment rights, and the court erred in imposing his amended sentence by failing to consider the mistakes made in his original sentence, or his post-sentence basis for relief. Quinn also asserts the court's failure to apply his amended guideline range in an advisory fashion violated his equal protection and due process rights.

We review a "district court's decision whether to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(2), based on a subsequent change in the sentencing guidelines, for abuse of discretion." *United States v. Brown*, 332 F.3d 1341, 1343 (11th Cir. 2003). However, in the § 3582(c)(2) context, we review "*de novo* the district court's legal conclusions regarding the scope of its authority under the Sentencing Guidelines." *United States v. White*, 305 F.3d 1264, 1267 (11th Cir. 2002). We also review "*de novo* questions of statutory interpretation." *United States v. Maupin*, 520 F.3d 1304, 1306 (11th Cir. 2008).

A district court may modify a term of imprisonment in the case of a defendant who was sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. § 3582(c)(2). This authority is limited to those guideline amendments listed in U.S.S.G. § 1B1.10(c) that "have the effect of lowering the defendant's applicable guideline range." U.S.S.G. § 1B1.10(a)(2) (Supp. May 1, 2008). Amendment 706 is listed in § 1B1.10(c). *See* U.S.S.G. App. C, amend. 713 (Supp. May 1, 2008). Effective

November 1, 2007, Amendment 706 adjusted downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table in U.S.S.G. § 2D1.1. *See* U.S.S.G. App. C, amend. 706 (2007). Therefore, a district court has discretion to reduce the sentence of a defendant whose sentencing range has been lowered by Amendment 706.

Any sentencing reduction, however, must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The Sentencing Commission's policy statements direct that a defendant is not entitled to a full resentencing during § 3582(c)(2) proceedings. U.S.S.G. § 1B1.10(a)(3) (Supp. May 1, 2008). The Commission has instructed district courts to determine the amended guideline range that would have been applicable to the defendant if the subsequently amended provision had been in effect at the time the defendant was originally sentenced. U.S.S.G. § 1B1.10(b)(1) (Supp. May 1, 2008). This is achieved by substituting the amended provision for the corresponding guideline provision that was applied when the defendant was sentenced, while "leav[ing] all other guideline application decisions unaffected." *Id.* Thus, a court may not reconsider any of its original sentencing determinations other than the provision subject to the amendment. *United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000).

After recalculating the guidelines, the court next must consider the sentencing factors listed in 18 U.S.C. § 3553(a), as well as public safety considerations, and may consider the defendant's post-sentencing conduct, in evaluating whether a reduction in the defendant's sentence is warranted and the

extent of any such reduction. U.S.S.G. § 1B1.10, comment. [sic] 1(B) (Supp. May 1, 2008). The district court is not required to articulate the applicability of each factor, "as long as the record as a whole demonstrates that the pertinent factors were taken into account by the district court." *United States v. Vautier*, 144 F.3d 756, 762 (11th Cir. 1998) (citing *United States v. Eggersdorf*, 126 F.3d 1318, 1322 (11th Cir. 1997) (finding that the district court's short order, referencing the government's brief that enumerated specific elements relevant to a § 3553(a) inquiry, provided sufficient reasons for the court's sentence). While the court must undertake this two-step analysis, its decision whether to reduce the defendant's sentence, and to what extent, is discretionary. *Id.* at 760.

Section 3582(c)(2) requires that a sentencing reduction be consistent with U.S.S.G. § 1B1.10, the Sentencing Commission's applicable policy statement. 18 U.S.C. § 3582(c)(2). Section 1B1.10(b)(2) provides in relevant part:

> (2) *Limitations and Prohibition on Extent of Reduction.*–
>
> (A) *In General.*–Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

U.S.S.G. § 1B1.10(b)(2) (made effective on March 3, 2008, by Amendment 712).

This Court has recently rejected Quinn's argument that the district court has the authority to ap-

ply *Booker* in a § 3582 resentencing. *United States v. Melvin*, __ F.3d __ , 2009 WL 236053 at *3 (11th Cir. Feb. 3, 2009) (holding "that *Booker* and *Kimbrough* do not apply to § 3582(c)(2) proceedings" and that "*Booker* and *Kimbrough* do not prohibit the limitations on a judge's discretion in reducing a sentence imposed by § 3582(c)(2) and the applicable policy statement by the Sentencing Commission."). And while the district court did not explicitly state any of the § 3553(a) factors that it considered, it did seek briefing from the Government, it did consider all submissions, and it did reduce Quinn's sentence to the low end of the guideline range. Therefore, there is no error.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
for the
Southern District of Florida

United States of America v. COLEY QUINN	Case No: 9:93-CR-8048-RYSKAMP USM No: 40000-004
Date of Previous Judgment: 01/27/1995 (Use Date of Last Amended Judgment if Applicable)	Coley Quinn, Pro Se Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of ☑ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion,

IT IS ORDERED that the motion is:

☐ DENIED. ☑ GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of 295 months **is reduced to** *248 months.

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level: 38
Criminal History Category: I
Previous Guideline Range: 235 to 293 months
Amended Offense Level: 36
Criminal History Category: I
Amended Guideline Range: 188 to 235 months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

☑ The reduced sentence is within the amended guideline range.

☐ The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.

☐ Other (explain):

III. ADDITIONAL COMMENTS

* Total imprisonment of 248 months, which consists of 188 months as to Counts One and Two of the Indictment to run concurrent and 60 months as to Count Three of the Indictment to run consecutive.

Except as provided above, all provisions of the judgment date 1/27/1995 shall remain in effect.

IT IS SO ORDERED.

Order Date: 04/22/2008
Effective Date: 5/2/08

[signed]
Judge's signature
Kenneth L. Ryskamp, U.S. District Court Judge
Printed Name and Title

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-8048-CR-RYSKAMP

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COLEY QUINN,

Defendant.

_____/

ORDER DENYING MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court on defendant's Motion for Reconsideration of Order Denying Motion for Reduction of Sentence, filed May 7, 2008. This Court having reviewed the pertinent portions of the record and being duly advised in the premises, it is hereby:

ORDERED and ADJUDGED that said Motion for Reconsideration of Order Denying Motion for Reduction of Sentence is **DENIED**.

DONE and ORDERED in West Palm Beach, this 8 day of May, 2008.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES SENTENCING GUIDELINES AMENDMENT 713

Chapter One, Part B, Subpart One, is amended by striking §1B1.10 and its accompanying commentary as follows:

* * *

and inserting the following:

"§1B1.10. *Reduction in Term of Imprisonment as a Result of Amended Guideline Range* (Policy Statement)

(a) *Authority.*—

(1) *In General.*—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) *Exclusions.*—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) *Limitation.*—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) *Determination of Reduction in Term of Imprisonment.*—

(1) *In General.*—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) *Limitations and Prohibition on Extent of Reduction.*—

(A) *In General.*—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) *Exception.*—If the original term of imprisonment imposed was less than the term of impris-

onment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) *Prohibition.*—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, and 702.

Commentary

Application Notes:

1. *Application of Subsection (a).*—

(A) *Eligibility.*—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the

defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment).

(B) *Factors for Consideration.*—

(i) In General .—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) *Public Safety Consideration.*—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) *Post-Sentencing Conduct.*—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. *Application of Subsection (b)(1).*—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the de-

fendant was sentenced. All other guideline application decisions remain unaffected.

3. *Application of Subsection (b)(2).*—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guide-

line range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. *Supervised Release.*—

(A) *Exclusion Relating to Revocation.*—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) *Modification Relating to Early Termination.*—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the

amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: '[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: 'If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.'

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magni-

tude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: 'It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.' S. Rep. 225, 98th Cong., 1st Sess. 180 (1983)."

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* So in original. Probably should be 'to fall above the amended guidelines'.